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Make-Believe: The Rules Excluding Evidence of Character and Liability Insurance

by
SAMUEL R. GROSS*

Article IV of the Federal Rules of Evidence includes several rules that prohibit the use of specified types of information as evidence of particular propositions. Subsequent remedial measures are inadmissible to prove negligence (but admissible to show ownership, control, et cetera),¹ settlement offers are inadmissible to prove liability (but admissible to show bias or prejudice, or for other purposes),² and so forth. Any exclusion of relevant evidence involves some distortion of reality in the sense that the picture presented to the trier of fact includes less information than the available total. That will be true whether the evidence is kept out by these special exclusionary rules, or by exclusionary rules intended to protect privacy or confidentiality,³ or by rules that exclude evidence because it may be unreliable⁴ or because it may confuse, mislead, or unfairly prejudice the jury.⁵ Distortion in this general sense is not necessarily bad. It can serve general social goals, make trials more efficient, and improve the accuracy of fact-finding by focusing attention on relevant issues and probative evidence. Distortion of this unavoidable sort is not the type of effect that I hope to describe in this paper.

When we exclude evidence that the defendant in a civil law suit offered to settle the claim for \$100,000, that does distort the jury's

* Professor, the University of Michigan Law School. This Article has benefited greatly from comments and suggestions from the participants at the Symposium, *Truth and Its Rivals: Evidence Reform and the Goals of Evidence Law*, at Hastings College of the Law, September 1997, and from research assistance by Tracy Thompson and Brian Donadio. The research was supported by funds from the Cook Endowment of the University of Michigan Law School.

1. See FED. R. EVID. 407. All references to "rule" and "rules" in the text refer to the Federal Rules of Evidence.

2. See FED. R. EVID. 408.

3. See FED. R. EVID. 501 (regarding privileges). See also *Jaffe v. Redmond*, 518 U.S. 1 (1996) (holding confidential communication between patient and psychotherapist, including licensed social worker in course of psychotherapy, privileged from compelled disclosure under FED. R. EVID. 501); *Trammel v. United States*, 445 U.S. 40 (1980) (holding that privilege against adverse spousal testimony vests only in witness spouse who may neither be compelled to testify nor foreclosed from testifying).

4. See FED. R. EVID. 801-802 (hearsay).

5. See FED. R. EVID. 403.

view of the case. A juror who hears about this offer after voting for a defense verdict might wonder if her decision was wrong. But this exclusion does not alter the jury's view of what the trial is really about, and it is not based on a distorted view of how trials are conducted; it merely limits the moves the plaintiff can make. In this case the limitation is simple and sensible. The parties attempted to resolve their dispute by other means, and failed; that's over, and should have no bearing on the trial they are now conducting in court. I don't mean to minimize the importance of settlements. They are our major method of resolving disputes; trials are rare exceptions.⁶ But when a trial does occur, information about the settlement process can be ignored without pretending that the trial is something that it's not.

Other Article IV rules, however, entail more basic distortions. I will focus on two: rule 404, which concerns character evidence, and rule 411, which deals with liability insurance. Rule 404, I claim, expresses a fundamentally false view of the *content* of common-law trials, while rule 411 embodies an equally basic misrepresentation of the *context* of personal-injury litigation.

I. Character Evidence

The rules governing character evidence are famously complicated and controversial. The basic rule sounds simple enough:

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion⁷

But as usual, there are exceptions and exclusions—for this rule, quite a few. A criminal defendant may present evidence of his own character⁸ or that of the alleged victim,⁹ in the form of opinion or reputation evidence,¹⁰ to prove conduct in conformity with that character trait—and the prosecutor may rebut such evidence.¹¹ Character evidence of various sorts may be used to impeach a witness.¹² Recently, Congress carved out a plenary exception for character evidence in sexual assault and child molestation cases.¹³ And, of course, evidence that is inadmissible for “character” or “propensity” purposes may be used

6. See, e.g., Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 2 (1996).

7. FED. R. EVID. 404(a).

8. See FED. R. EVID. 404(a)(1).

9. See FED. R. EVID. 404(a)(2).

10. See FED. R. EVID. 405(a). Specific instances of relevant conduct may be explored on cross examination. See *id.*

11. See FED. R. EVID. 404(a)(1) and (2).

12. See FED. R. EVID. 608 and 609.

13. See FED. R. EVID. 413-415.

for other purposes:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . .¹⁴

The rules governing character evidence are probably the most litigated of all rules of evidence. They are widely criticized as complicated, arbitrary, and poorly understood. Specifically, among other points, critics argue that:

- Character evidence that is admitted for impeachment will inevitably be used for propensity,¹⁵ especially when it's evidence of prior convictions by a criminal defendant.¹⁶
- The permitted "non-propensity" uses of prior conduct are often indistinguishable from propensity.¹⁷
- Frequently, character evidence that is admitted for ostensibly "non-propensity" purposes is severely and unfairly prejudicial, especially to criminal defendants.¹⁸
- The exceptions for sexual assault and child molestation cases cannot be reconciled with the general exclusion of propensity evidence: If a defendant is charged with molesting and killing a child, does it make sense to admit allegations that he fondled other children, but exclude a judgment of conviction for murdering one of them?¹⁹
- The basic rule is bad. Propensity evidence—especially evidence of serious prior misconduct—is too probative to exclude.²⁰

I will not address any of these arguments, at least not directly. My point is different in kind, and has no immediate policy implications. It is that what we regulate as "character evidence" is only a small part of the evidence and arguments that lawyers use to develop competing versions of the characters of the actors in the events that

14. FED. R. EVID. 404(b).

15. See, e.g., H. Richard Uviller, *Credence, Character and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776, 802-03 (1993).

16. See, e.g., Richard Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637 (1991).

17. See, e.g., H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 877-79 (1982).

18. See, e.g., Edward J. Imwinkelried, *The Need to Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence*, 30 VILL. L. REV. 1465, 1487-88 (1985).

19. See, e.g., James S. Liebman, *Proposed Evidence Rules 413 to 415—Some Problems and Recommendations*, 20 U. DAYTON L. REV. 753, 756 (1995).

20. See generally Roger Park, *Character at the Crossroads*, 49 HASTINGS L.J. 717, 721 (1998) (at § II(A)(1)(a)).

are subject to litigation. Our character evidence rules are like a law that claims to regulate hunting by prohibiting the use of rifles for killing wild animals (but not for butchering tame ones) (and with several exceptions)—but which never mentions shotguns, pistols, bows and arrows, dogs, hawks, poison, traps, or snares.

The theory of the character evidence rule is that (subject to exceptions) the jury is supposed to base its judgment on evidence of what the relevant actors in the case *did*, not what sort of people they *are*. This distinction is inconsistent with our usual process of reasoning. When the question is "*Did Emma steal?*" we inevitably think "*Would she?*" If she's done it before, probably yes; if she never has, maybe not. This is not a problem of "prejudice" in the sense of bias, although that too comes up regularly with character evidence. ("Well, maybe she is guilty, but she's a widowed mother.") It's simply a common, perhaps universal, line of inference that is theoretically forbidden by common-law rules of evidence. Trial attorneys are deeply aware of this predilection. If they want to win, they learn to do everything possible to develop character images that suit their purposes. What we label "character evidence," however, has little or nothing to do with this pervasive practice of character development.

Consider the O.J. Simpson criminal case. The defense presented no "character evidence" about Mr. Simpson, although it was entitled to do so, but that hardly means they didn't focus on his character as a person. Perhaps their first public move in that direction was made at the initial arraignment, when attorney Robert Shapiro asked the judge, on national television, to order the sheriff's department to permit Mr. Simpson to use a special pillow, which he produced, that would provide adequate cervical support.²¹ The message (to the world, and to potential jurors): O.J. is an aging man, beset by aches and pains—no longer a football player, let alone a rampaging killer. Or consider the opening lines of the defense attorney's opening statement in the uncelebrated criminal prosecution of Ronald Tellez. "This is not a case about an attempt[ed] escape in custody. As you will see, as the evidence is explored in this case . . . there was no place for Ron to go, no place for him to escape to."²² Message: The defendant (charged with assaulting an officer and trying to escape from custody while awaiting trial for capital murder) is an ordinary guy, "Ron," one of us.

It is only a slight exaggeration to say that almost everything trial lawyers do is designed, at least in part, to develop the character of

21. Jim Mulvaney, *O.J. Pleads Not Guilty; DA Says He Acted Alone*, *NEWSDAY*, June 21, 1994, at 4.

22. *People v. Tellez*, No. 87-12500, Circuit Ct., Cook County (Ill.), Jan. 19, 1989 (transcript on file with author).

one or more of the participants in the events at issue. Parties and witnesses are told to dress and behave in ways that are appropriate to the images the lawyers want to convey.²³ They are taught to testify “in character”—to be polite, low key, thoughtful, whatever. Cross examiners try to get witnesses, especially opposing parties, to lose control and break from their assigned characters, usually by showing anger. Family members and friends are recruited to show up and play supporting roles. When the jury is watching, lawyers treat their clients in the manner that is appropriate to the characters they want the jury to see—friendly, intelligent, trusting, respectful—and they dress and act to convey the impression that they themselves are the sort of people the jurors can trust. And so forth.

Naturally, the lawyers don’t usually say “My client is an honest, thoughtful, soft-spoken, well-dressed middle-class man, just like you.” Like all good dramatists, they try to show it. Sometimes, however, the characterization is made explicit by the opposition, to discredit it. Consider, for example, an excerpt from the closing argument for the defendant in a drug sale case where the defense was entrapment:

What about Don Howe? On the day this sale took place, he was not the same clean-cut, well-dressed man that you saw and heard in this courtroom. In fact, on that day he wasn’t even Don Howe. He was using the name Gene Hall. He was not wearing his coat and tie then. He had long hair to his shoulders; he was dressed in faded blue jeans and a dirty sweatshirt; he had a full growth of beard on his face; he was drinking wine; and, according to the testimony of Mel Gabe, he had been smoking marijuana. In short, he was doing everything in his power to win the confidence of these young people so he could trap them into allowing him to persuade them to commit an unlawful act so that he could then come into court and prosecute them.²⁴

And occasionally we might hear a lawyer with a particularly hard hand to play argue that his client actually does have a human character:

When you were chosen for this jury, you agreed to decide this case fairly and impartially. Now, I represent a corporation and Mr. Gursky represents an individual. You might think of a corporation as impersonal, but Memorex consists of *people*, decent, hard-working people like Joe and Richard. And *those people* are counting on you to give them the same consideration as plaintiff, as I am certain you

23. “Usually, I like my expert [witness] to . . . wear a tweedy jacket and smoke a pipe . . .” Hyman Hillenbrand, *The Effective Use of Expert Witnesses*, BRIEF, Fall 1987, at 48, 49.

24. JACOB A. STEIN, CLOSING ARGUMENT, *THE ART AND THE LAW*, § 619, at 693 (1996) (looseleaf; orig. pub. 1969).

will.²⁵

Why are these character arguments permitted? A skillful advocate could claim that neither of the arguments I quoted is a "propensity" argument. The first can be justified as an attempt to explain *how* the undercover agent entrapped the defendants, and the second as an exhortation to the jury not to be biased against a corporate defendant. But the effect is the same either way. In particular, character arguments, whether or not they speak in terms of propensity, can bias the fact finder by creating sympathy or antipathy; that's usually the point of making them. Nonetheless, lawyers are permitted to describe the character of parties and others in highly emotive terms, so long as the characterizations are plausibly based on evidence concerning conduct that is the subject of the trial. In *Williams v. State* the defendant was sentenced to life imprisonment for raping an eight-year old girl.²⁶ In the course of his argument, the prosecutor said that the "[d]efendant was under the record the vilest type of character known to humanity," that he had "a warped brain, a degenerate mind," and that he "should be killed just as a person would kill a rattlesnake."²⁷ The appellate court had no difficulty with this: "We agree with the prosecutor that an adult who would commit the acts done by the defendant shows that he is 'lowdown, degenerate, and filthy.' He richly deserves the punishment which he received."²⁸

Williams, no doubt, is an extreme case, but there is no shortage of less extreme cases in which the court permitted the prosecutor to describe a criminal defendant as a "professional assassin,"²⁹ a "hired gun-fighter,"³⁰ a "dope pusher,"³¹ an "executioner,"³² an "animal,"³³ a "punk,"³⁴ a "type of worm,"³⁵ or a "mad dog."³⁶ To be sure, there are

25. *Id.* § 303, at 22.

26. 226 P.2d 989, 991 (Okla. Crim. App. 1951).

27. *Id.* at 997.

28. *Id.* See also *State v. Lang*, 66 A. 942, 945 (N.J. 1907) ("the prosecutor was within his privilege in making the statement [that] the defendant was 'a monster in his passions, licentious in his desires, beastly in his love, brutal when thwarted and cowardly when caught.'").

29. *State v. Hunt*, 373 S.E.2d 400, 413 (N.C. 1988), *sentence vacated on other grounds*, 494 U.S. 1022 (1990).

30. *Johnston v. United States*, 154 F. 445, 449 (9th Cir. 1907).

31. *State v. Prince*, 713 S.W.2d 914, 918 (Tenn. Crim. App. 1986).

32. *People v. Franklin*, 552 N.E.2d 743, 753 (Ill. 1990); *People v. Cunningham*, 532 N.E.2d 511, 517 (Ill. App. Ct. 1988).

33. *Williams v. Alabama*, 377 So. 2d 634, 639 (Ala. Crim. App. 1979). See also *State v. Craig*, 302 S.E.2d 740, 747 (N.C. 1983) (permitting a description of defendants as "a pack of wolves").

34. *State v. Canisales*, 615 P.2d 9, 10 (Ariz. Ct. App. 1980).

35. *United States v. Walker*, 190 F.2d 481, 484 (2d Cir. 1951).

36. *Commonwealth v. Capps*, 114 A.2d 338, 342 (Pa. 1955); *Miller v. Georgia*, 177

cases on the other side in which judgments have been reversed for very similar arguments: "cheap, scaly, slimy crook,"³⁷ "leech[] off society,"³⁸ or "'junkie', 'rat' and a 'sculptor' with a knife."³⁹ But they have not been reversed because these arguments violate the character evidence rule. Rather, the courts have drawn a weaving, inconsistent, frequently invisible line between statements that are permissibly harsh, and those that are prejudicially inflammatory.

To be sure, there is a logical distinction at issue. If the claim that the defendant is "the vilest type of character known to humanity" is based solely on evidence that he committed the crime with which he is charged, then to argue that he has this character trait is not to claim that he acted in accord with that trait on a particular occasion. The causal inference runs in the opposite direction: Evidence that the defendant committed the crime is the basis for the argument that he is vile. Ergo, it is not a propensity argument. Q.E.D.

So what? Whether they are "inflammatory" or merely "passionate," these characterizations are designed to arouse the jury. It may be hard to see why a court would permit a lawyer to make this sort of emotional appeal—when they are allowed, there is rarely any explanation—but it is easy to understand why a lawyer would want to do it. It is done in the hope that the anger and horror that are evoked will drive the jury's judgment before them—which is precisely one of the arguments regularly voiced against propensity evidence. Furthermore, there is an inferential feedback loop that amounts to a judgment from propensity: "You have convinced me that the evidence that he committed this vicious crime shows that he is a vicious beast; and because he is a vicious beast, I am reassured in my conviction that he committed this vicious crime." This argument is circular, but that does not mean it has no impact. Most important—backing up a step—these arguments do speak to *character* if that term has any consistent meaning. That they are not within the ambit of the character evidence rule as we apply it says a lot about the real meaning of that rule.

Odder yet, explicit propensity arguments are regularly tolerated in contexts in which propensity evidence would be excluded. Here is an excerpt from the prosecution's summation in the 1935 trial of Bruno Hauptmann, a German immigrant who was convicted of kidnapping and murdering the infant son of Charles Lindbergh, the celebrated aviation pioneer:

[W]hat type of man, what type of man would kill the child of Colo-

S.E.2d 253, 254-55 (1970), sentence vacated on other grounds, 408 U.S. 938 (1972).

37. *Volkmar v. United States*, 13 F.2d 594, 595 (6th Cir. 1926).

38. *State v. Owen*, 253 P.2d 203, 211 (Idaho 1953).

39. *People v. Hickman*, 312 N.Y.S.2d 644, 644 (N.Y. App. Div. 1970).

nel Lindbergh and Anne Morrow? He wouldn't be an American. No American gangster and no American racketeer ever sank to the level of killing babies

It had to be a secretive fellow. It had to be a fellow that wouldn't tell anybody anything. It had to be a fellow that wouldn't tell his wife about his money, who would conceal the truth from her. It had to be a fellow that wouldn't trust a bookkeeper, that would take books and enter every little item, groceries, boats, everything, himself. It had to be a fellow that could undergo hardship, no ordinary hardship; it had to be a man that you could kill in cold blood here and he wouldn't tell if he didn't want to—the kind of a fellow that would stow away on a boat and travel three thousand miles to sneak into the country in a coal bin, without food, without water, a man that could undergo that hardship, and when he was apprehended in court he would go back again and try it over again. That's the type of a man

[I]t would have to be the type of man that wouldn't think anything of forsaking his own country and disgracing his own nation; it would have to be the sort of a fellow that would leave everything behind and flee and go to another country and another land, a strange land; it would have to be the type of man that would forsake his own mother, sixty-five years of age, and run away⁴⁰

It is easy to attack the prosecutor's argument in the *Hauptmann* trial. The prosecutor makes a blatant and inflammatory appeal to chauvinistic prejudice. Moreover, some of the evidence on which the argument is based ought to have been inadmissible for any purpose—for example, the fact (if true) that Hauptmann left his aged mother and ran away. But there was no objection, Hauptmann's conviction was affirmed,⁴¹ and he was executed. Maybe the courts would be more scrupulous today, maybe not. More important, from my point of view, is that the basic structure of the argument is common. Most of the facts mentioned by the prosecutor's were admissible for "non-propensity" purposes: That Hauptmann was an immigrant might have come in as background evidence when he testified, that he was a stowaway might have been admissible as prior misconduct relevant to impeachment, and his secretiveness about money might have been relevant to explain how he concealed the ransom. None of these facts would have been admissible as propensity evidence to prove that he kidnapped and murdered, yet once admitted for other purposes, they were used, without objection, for just that purpose. Take away the jingoism, and similar things happen in modern American courts all the time.

40. Prosecution's Closing Argument at TR 4366-4368, *State v. Hauptmann*, Hunterdon County Oyer & Terminer Court (1935).

41. See *State v. Hauptmann*, 180 A. 809, 829 (1935).

The simplest form of this occurs when otherwise admissible evidence is used by a lawyer for favorable propensity arguments about the party she represents. For example, in the *Tellez* case,⁴² the defendant was himself a former police officer. His lawyer used that fact in her closing argument, without objection: "The natural instinct of [anybody] to defend himself, I would think that that gets doubled or tripled or who knows by a police officer who has for years put his life on the line defending the public."

No one would argue that a defendant's having been a police officer is *admissible* to prove that he is likely to have used force in self-defense. But once that evidence is before the jury, nobody thinks to object when a lawyer draws that conclusion.

Similar character arguments are routinely made in other situations. For instance, in the O.J. Simpson murder trial, his chief defense attorney made the following argument about a witness who happened to sit next to Mr. Simpson on a plane ride from Chicago to Los Angeles:

And I thought very interesting about this man, Partridge. Remember, he's the man who was a patent lawyer who had gone to Harvard. And he observed O.J. Simpson on this flight back. He saw him make these phone calls. He saw his emotional state He wrote notes about what took place—not to publish them. He's a patent lawyer. So he understood⁴³

It's impossible to claim that evidence that Mr. Partridge is a patent lawyer, or that he went to Harvard, should be admitted because it shows that he is a credible witness. Some types of "character evidence" are admissible on credibility, but not this. But once the evidence is in (probably as "background") nobody thinks to object when a lawyer makes that precise point in argument.

One last example, this one from a leading treatise on closing argument:

Ladies and gentlemen, I submit to you that the evidence has shown beyond a reasonable doubt that this young man, Thaddeus Cydzik, was more than an innocent bystander in this matter not just in the commission of the armed robbery but in the commission of the killing. He knew what was going to happen, ladies and gentlemen. He certainly had a good idea what could happen and I submit he had a good idea what was in fact going to happen. *This is an intelligent young man. He was almost a straight A student in high school, an honor student. He is a young man who has had every-*

42. *People v. Tellez*, No. 87-12500, Circuit Ct., Cook County (Ill.), Jan. 19, 1989 (transcript on file with author).

43. Official Transcript Closing Argument by Mr. Cochran at *55, *People v. Simpson*, Superior Court, Los Angeles County (California), Dept. 103, Sept. 1995, 1995 WL 686429 (No. BA097211).

thing placed at his disposal, a good family, a strict family, and a family that saw to it that he did not have to work when he went to college. He certainly didn't need money from an armed robbery to further his education, ladies and gentlemen.

But my point is that this young man was and is a leader, and not a follower. If you want to believe that this young man followed Donald Paulson in everything he did, then so be it. If you want to believe that the defendant was directed by someone who had not had the benefit of a higher education, then so be it. This young man knew what he was going to do when he went in there. He knew what could happen during the course of an armed robbery. He knew that someone could get killed but he just didn't think it would happen this time. Well, it did.⁴⁴

Here, favorable evidence about the defendant is used against him. The argument is seamless and plausible; it does not sound even mildly objectionable. And yet, as the italicized portions highlight, it is in part a propensity argument. Mr. Cydzik is intelligent and able; he is a leader; therefore he is unlikely to have been an ignorant follower in this crime.

It is difficult to imagine a similar pattern for the other Article IV exclusionary rules. Consider a case in which evidence of a subsequent repair to a stairway bannister was admitted to show the defendant landlord's control over the place in which the plaintiff was injured. What if the plaintiff's attorney argued to the jury:

You've heard that after this terrible accident Mr. Markman, the landlord, replaced the old, cracked wooden railings on the stairs with steel rods. Why would he do that, unless the wooden railings were dangerous?

Surely that lawyer would be stopped, perhaps even by the court *sua sponte* if there was no immediate objection. The argument is a flagrant violation of rule 407. But equally flagrant propensity arguments are not stopped; that they undercut rule 404(a) seems to go totally unnoticed. The difference is that evidence and arguments on subsequent repairs are a small corner of the trial process, easy to isolate and exclude. "Character" and "propensity" are ubiquitous.

By now, it is commonplace that most successful courtroom advocacy is structured as storytelling rather than logical proof.⁴⁵ To be effective, a story must correspond to the jurors' image of what a story should be,⁴⁶ an image drawn from the most numerous and vivid stories they read, hear, and see—which is to say, from fiction. But fiction is different from life, and fictional people are not the same as or-

44. STEIN, *supra* note 24, § 577, at 583 (emphasis added).

45. See generally Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision-Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991).

46. See *id.* at 525-527.

dinary mortals. In *Aspects of the Novel*, E.M. Forster examined these differences.⁴⁷ Forster paraphrased from a French critic who wrote under the pseudonym Alain:

What is fictitious in a novel is not so much the story as the method by which thought develops into action, a method which never occurs in daily life History, with its emphasis on external causes, is dominated by the notion of fatality, whereas there is no fatality in the novel; there everything is founded on human nature, and the dominating feeling is of an existence where everything is intentional, even passions and crimes, even misery.⁴⁸

This peculiar mode of behavior is comprehensible—indeed, expected—because our relationship to the characters in stories is fundamentally different from our relationship to people in the world. As Forster explained, in his own voice:

We know each other approximately, by external signs, and these serve well enough as a basis for society and even for intimacy. But people in a novel can be understood completely by the reader; their inner as well as their outer life can be exposed. And this is why they often seem more definite than characters in history, or even our own friends; we have been told all about them that can be told; even if they are imperfect or unreal they do not contain any secrets, whereas our friends do and must, mutual secrecy being one of the conditions of life upon this globe.⁴⁹

We know why fictional people act as they do because we are told. Their actions are plausible and their stories are compelling when their motivation is based on their “nature”—their character—which we also know (because we are told) as we never do in life. There is a great deal of evidence that most people overestimate the predictive value of “personality” or “character,” that such traits are not a reliable basis for predicting behavior in life.⁵⁰ But in stories—fictional stories—character is a strong and reliable predictor of conduct, by authorial fiat. The ambition of trial lawyers is to achieve that sort of control in court, to author the courtroom story that carries the day. To succeed, they work with familiar, proven forms. Their art imitates

47. E.M. FORSTER, *ASPECTS OF THE NOVEL* (1927).

48. *Id.* at 46.

49. *Id.* at 47.

50. See, e.g., Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases* 4-5, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (D. Kahneman et al. eds. 1982); JOHN MONAHAN, *PREDICTING VIOLENT BEHAVIOR* 77 (1981). See generally David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 25-31 (1987); Miguel A. Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1041-60 (1984). But see Susan M. Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504, 518-19 (1991).

art.

In short, character is central to the task of the trial advocate. As in fiction, it is more important, more central in court than in life. If we really excluded character evidence and character argument (or limited them to their *de jure* range) we would drain half the fun from the game. So we do not bother thinking about it, unless a lawyer crosses a heavily contested line—typically, by insinuating inadmissible evidence of prior crimes,⁵¹ or by transparently arguing propensity from evidence of prior misconduct that was admitted solely for impeachment.⁵²

II. Liability Insurance

If character is the grain, the texture of trials, insurance—in civil cases—is the hidden infrastructure. In most civil trials “insurance” is the real answer to the question: “Who’s going to pay?” However, if that question comes from the jury, the legally correct answer is: “None of your business.” Rule 411 tells us that:

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully.⁵³

But that’s only one part of the rule of exclusion. The question that juries might really care about is one they are not allowed even to ask: “If we do find that the defendant was negligent, will she have to pay or will some big insurance company cover the damages?”⁵⁴

Like Rule 404, Rule 411 was not an innovation when the Federal Rules of Evidence went into effect in 1975. It may be an exaggeration to claim that it is “one of the oldest enduring doctrines in American jurisprudence,”⁵⁵ but excluding evidence of insurance was, and remains, a well-established practice. Unlike Rule 404, however, Rule 411 has not been amended⁵⁶ or modified by the enactment of other rules. Before and after codification, this exclusion has been comparatively uncontroversial—at least in court. Almost all judges

51. See, e.g., *People v. Mejias*, 420 N.Y.S.2d 737 (1979); *People v. Wright*, 359 N.E.2d 696 (N.Y. 1976).

52. See, e.g., *People v. Fields*, 631 N.E.2d 303 (Ill. App. Ct. 1994); *State v. Sanders*, 634 S.W.2d 525 (Mo. Ct. App. 1982); *State v. Moran*, 444 A.2d 879 (Vt. 1982).

53. FED. R. EVID. 411.

54. Similarly, in criminal cases, where everybody knows *who’s* going to pay the penalty, the jury is instructed that in deciding on guilt it may not consider *how much* the defendant will be punished if convicted. See, e.g., *Rogers v. United States*, 422 U.S. 35, 40 (1975). Cf. *Shannon v. United States*, 512 U.S. 573 (1994) (jury need not be informed of the consequences of a verdict of not guilty by reason of insanity).

55. Alan Calnan, *The Insurance Exclusionary Rule Revisited: Are Reports of Its Demise Exaggerated?*, 52 OHIO ST. L.J. 1177, 1177 (1991).

56. Ignoring the “technical” amendment in 1987, to remove masculine pronouns.

seem to agree that there is no legitimate reason for jurors to hear about insurance, and that if they do they might be tempted to find for the plaintiff even if the defendant is not really liable, on the theory that a poor, injured accident victim needs money more than a rich insurance company.

Most commentators, by contrast, criticize the rule, sometimes scathingly. The standard criticism runs something like this: (1) Admittedly insurance has little or no probative value on any issue a jury might have to decide.⁵⁷ (2) However, it is unclear that mentioning insurance does much harm. There is some empirical evidence of bias against insurance companies and other deep-pocket defendants, but overall, the data are not overwhelming.⁵⁸ Besides, insurance is now so prevalent that most jurors no doubt *assume* that defendants are insured.⁵⁹ If so, the only parties affected by the rule are the minority of uninsured defendants who might be hurt by the *absence* of any reference to insurance. (3) In any case, everybody knows that plaintiffs' attorneys frequently circumvent the rule and raise the issue of insurance, ostensibly for some other permissible purpose, but in fact because they want to provoke the improper "deep-pocket" bias that judges fear.⁶⁰ (4) Despite its inefficacy—or perhaps precisely because it's so easy to bypass—the rule generates manipulation, argument, error, and reversal. In short it "has become a hollow shell, expensive to maintain and of doubtful utility."⁶¹

Moreover, to the extent that Rule 411 does work, it is deceptive.⁶² If the defendant is insured, the insurance company, for all sig-

57. See, e.g., CHARLES MCCORMICK, MCCORMICK ON EVIDENCE § 201, at 852 (4th ed. 1992).

58. Compare Dale Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 753-54 (1959) (mock jurors exposed to information about insurance awarded higher damages), with Valerie P. Hans & William Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 LAW & SOC'Y REV. 85 (1992) (jurors skeptical of claims against business defendants, and concerned to control damage award) and Elizabeth Loftus, *Insurance Advertising and Jury Awards*, 65 A.B.A. J. 68 (1979) (mock jurors exposed to insurance information awarded lower damages).

59. See Calnan, *supra* note 55, at 1189-90.

60. Four avenues for raising the issue of insurance are discussed repeatedly: (1) prospective jurors may be asked on voir dire about connections to the insurance industry, including stock ownership; (2) insurance may be brought up for some permissible purpose—typically to show ownership or control of a vehicle or of premises, or to impeach a witness (for example, an investigator) who is employed by the defendant's insurer; (3) insurance is sometimes mentioned in a pre-trial admission by the defendant, or in an admissible document; and (4) witnesses occasionally mention insurance in response to questions that are not specifically addressed to that issue. See *id.* at 1183-88; MCCORMICK, *supra* note 57, § 201, at 853-56.

61. MCCORMICK, *supra* note 57, § 201, at 858.

62. See Leon Green, *Blindfolding the Jury*, 33 TEX. L. REV. 157, 162-63 (1957);

nificant purposes, is the real party in interest. Why should an insurance company be allowed to masquerade as an impecunious individual? Other corporate defendants—manufacturers in products liability cases, for example—don't have that option. The fact that the wealth of a party may affect jury verdicts does not in itself justify this charade. Even if we knew for sure that juries treat corporate defendants more harshly than individuals, it would not follow that insurance companies and other corporations are treated unfairly. It is equally possible that individual defendants are unfairly favored at the expense of the plaintiffs who sue them. Rather than strive with mixed success to keep jurors ignorant, wouldn't it make more sense to let them know who's really who, and to instruct them not to take the economic status of either party into account?

In practice, Rule 411 remains in effect. That means that in a civil case with an insured defendant, the jurors might hear about insurance or they might not. If they do, it is likely to be a passing reference; if they do not, they may or may not think about it on their own. Either way, it is hard to believe that the exclusion of evidence of liability insurance is a big deal. Rule 411 is a well-defined rule addressed to an isolated aspect of the trial process. It works or it doesn't, but its implications are limited.

In the world outside the courtroom, however, insurance is the engine that powers civil litigation in almost every respect. Liability insurance is not an occasional fortuitous event. On the contrary, the vast majority of civil defendants who go to trial are insured. For example, a survey of defense attorneys in 303 civil trials in California Superior Courts in 1990-91 found that 81% of the defendants were insured.⁶³ Significantly, the minority of uninsured defendants were mostly "deep-pocket" entities in their own right: large companies (21% uninsured) and government entities (67% uninsured).⁶⁴ Those defendants who stood to gain from Rule 411—individuals and small companies—were insured in 96% and 91% of their trials, respectively.⁶⁵

Insurance companies are not merely responsible for damages in civil cases; they also pay for the legal defense.⁶⁶ As an incident of its duty to defend, the insurer almost always chooses the lawyer who represents the insured in court. In most cases, insurers also have the power to settle claims within the policy limits without the consent of

22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM JR., *FEDERAL PRACTICE AND PROCEDURE* § 5263 at 434-35 (1980).

63. See Gross & Syverud, *supra* note 6, at 21 tbl.11.

64. See *id.*

65. See *id.*

66. See *id.* at 25 tbl.14.

the nominal defendant.⁶⁷ Given this structure, it's no surprise that civil defense counsel are widely known—indeed, describe themselves—as “insurance counsel.” They belong to the Federation of Insurance Counsel or the International Association of Insurance Counsel, they subscribe to Insurance Counsel Journal, and so forth. But in court all this is taboo.

The importance of insurance in civil litigation is not restricted to the defense. Almost all civil plaintiffs are represented by lawyers who are paid on a contingency-fee basis. For example, 94% of all plaintiffs in California Superior Court Civil trials in 1990-91 paid their attorneys entirely on a contingent basis, including 96% of individual plaintiffs and 99% of plaintiffs in personal injury cases.⁶⁸ Because plaintiffs' lawyers are paid from the recoveries they obtain, liability insurance—the dominant source of damage payments in civil litigation—is the essential mechanism for financing the plaintiffs' bar as well as the defense bar. Also, plaintiffs' lawyers, who are not paid if they do not recover damages, have no interest in suing defendants who cannot pay substantial judgments. As a result, with the exception of large companies, governmental entities, and occasional rich individuals, uninsured defendants are rarely sued.⁶⁹ (And if they are sued, they cannot afford to defend themselves, so the law suits almost never go to trial.) On the other hand, if potential plaintiffs start to buy insurance against an unlikely liability risk—clergy malpractice, for example—that in itself may generate litigation, and increase the likelihood of being sued.⁷⁰

The centrality of liability insurance to civil litigation is codified in rule 26(a)(1)(D) of the Federal Rules of Civil Procedure, which provides:

[A] party shall, without awaiting a discovery request, provide to other parties: . . . for inspection and copying . . . any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action

The rule that liability insurance is inadmissible to prove fault does not, of course, mean that insurance contracts are immune from dis-

67. See Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1118-19, 1172-85 (1990). The major exception is medical malpractice, where many liability policies require that the insured doctor consent to any settlement. See Gross & Syverud, *supra* note 6, at 58-59; see also Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 360-61 (1991).

68. See Gross & Syverud, *supra* note 6, at 16 tbls.4 & 5. See also HERBERT KRITZER, *THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION* 58-59 (1990).

69. See Gross & Syverud, *supra* note 6, at 51-52; see also Kent D. Syverud, *On the Demand for Liability Insurance*, 72 TEX. L. REV. 1629, 1634 (1994).

70. See Syverud, *supra* note 69, at 1638.

covery. Rule 26(b)(1) of the Federal Rules of Civil Procedure sets the standard for discoverability considerably lower, merely requiring that "the information sought appears reasonably calculated to lead to the discovery of admissible evidence." But the possibility that information about liability insurance may "lead to the discovery of admissible evidence" does not explain this blanket rule requiring unsolicited disclosure of the text of any insurance policy that might pay for any alleged damages. The real justification is different: Because the insurer is the plaintiff's real opponent, and the insurance policy is the real asset in dispute, settlement negotiations will be more efficient if we acknowledge who's really handling the defense, and disclose how much money is at stake and on what terms.⁷¹

Finally, insurance has become a central normative issue in debates and litigation over the extent of civil liability in tort. On some issues, liability insurance has been an explicit consideration in one form or another. Consider two examples: (1) Most of the cases abrogating intrafamilial tort immunity rely in part on the argument that the widespread availability of liability insurance transforms the typical lawsuit between family members into a claim by a member of the family against an insurance company—a shift that undermines the argument that the tort suits among close relatives destroy family harmony.⁷² (2) More recently, several scholars have argued that tort liability for pain and suffering amounts to a form of compulsory insurance for such damages, which consumers pay for through higher prices for products that are the subject of products liability suits, higher medical fees to finance higher malpractice premiums by doctors, and so forth. These scholars further argue that because consumers do not voluntarily insure themselves directly against such non-pecuniary damages (although they do insure against the economic consequences of accidents or disease, such as lost income or medical expenses), the law should not impose this type of "insurance" on them in the guise of tort liability.⁷³

71. See FED. R. CIV. P. 26 advisory committee's note on 1970 amendment.

72. See, e.g., *Gelbman v. Gelbman*, 245 N.E.2d 192, 193-94 (N.Y. 1969) ("Such [compulsory automobile liability] insurance effectively removes the argument favoring continued family harmony as a basis for prohibiting suit. The present litigation is in reality between the parent, passenger and her insurance carrier."). See also *Balts v. Balts*, 142 N.W.2d 66 (Minn. 1966); *France v. A.P.A. Transport Corp.*, 267 A.2d 490 (N.J. 1970). See generally W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 82, at 595 (5th ed. 1984) [hereinafter PROSSER & KEETON].

73. See, e.g., George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1546-47 (1987); STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 228-231 (1987). But see Steven R. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785 (1995) (disputing the argument in the text on both empirical and normative

In other contexts, the normative significance of liability insurance is less explicit, but equally important. For example, Prosser and Keeton challenge the claim that the great expansion in the scope of liability for medical malpractice over the past 70 years was caused by the concomitant spread of medical malpractice insurance. They argue that "[i]t would be quite as reasonable to say that the spread of malpractice insurance itself is a consequence of the expanded liability" ⁷⁴ That may be. But whatever its origins, the current system of medical malpractice liability would have destroyed the practice of medicine, if it weren't for liability insurance. How many people would become anesthesiologists or obstetricians if ordinary negligence in the treatment of any one of thousands of patients might subject them to ruinous personal liability?

In short, liability insurance has become the heart of our system of tort law. For the system as a whole, the availability of insurance—actual or hypothetical—is an assumption around which the rules of the game are organized. For an individual case, insurance, as a practical matter, is as much an element of a cause of action as negligence or damages. From the point of view of the typical individual defendant, a civil law suit is mostly the insurance company's headache; it is a disaster that has been paid for in advance. From the point of view of the typical personal-injury plaintiff, the task at hand is to find an insurance policy that covers the accident in which she was injured, and to get compensation from the insurer. That is the goal her attorney will pursue in investigation, discovery, preparation, and settlement negotiations; in all but the rarest cases, matters will end there. But if the case happens to go to trial, the jury will hear a dispute about fault and justice. These two descriptions are not entirely incompatible, but they certainly are not the same.

Conclusion

The official story is that a trial is about historical facts. The jury is supposed to answer the question: What happened? That's all. But that is not the only question that defines what a case is really about. We also want to know: Who are we talking about? And who's going to have to pay? The rules that exclude evidence on these basic questions embody two equally basic distortions.

If we really wanted to exclude character and propensity from consideration at trial we would have to tell jurors something like this: "Figure out what happened—what these people *did*—but pay no attention to what *sort of people* they are, or to how likely people like

grounds).

74. PROSSER & KEETON, *supra* note 72, § 82, at 589.

that are to do such things.” This would be quite a change. At best it would be very hard to pull off, if anybody really wanted to try. Instead we have written a character evidence rule that purports to be general and categorical, but we live by a much narrower set of restrictions that focus on a few contested areas—mostly, prior misconduct by witnesses and criminal defendants.

Evidence of insurance, by contrast, can be successfully managed within the existing rules. Rule 411 does not always work, but it does sometimes, and it could be strengthened—or abandoned—without changing trials in any fundamental way. Ultimately, the question, “Who pays?” probably doesn’t matter that much to jurors. They may know the answer, or believe they do, and they might care about it, but it is not necessary to their job. They can do their best to figure out what happened and to decide how much it will cost without addressing that issue at all. But “Who pays?” matters enormously to everybody who has a stake in the case, lawyers and parties alike. The distortion here is not that the rule misrepresents practice at trial, but that it is our routine practice—of which this rule is a part—to describe cases to juries in terms that are far different from those we use when we deal with them among ourselves.